IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 8

JOINT ANTI-FASCIST REFUGEE COMMITTEE,
an unincorporated association,
Petitioner,

v.

J. HOWARD McGRATH, Attorney General
of the United States, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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Opinion Below

The majority and dissenting opinions in the Court of Appeals for the District of Columbia Circuit are reported at 177 F. 2d 79 (R.* 36-48).

Jurisdiction

The judgment of the Court of Appeals, affirming the order of the District Court for the District of Columbia which dismissed the complaint on motion for legal insufficiency and denied petitioner's motion for a preliminary in-

* Page references in the transcript of record are hereinafter cited as "R".

junction, was made and filed August 11, 1949 (R. 49). A petition for rehearing addressed to the said Court of Appeals was denied by order dated and filed September 22, 1949 (R. 50-51). On motion of the petitioner herein an order was made by Mr. Chief Justice VINSON on December 12, 1949 extending the time for petitioner to petition for writ of certiorari to and including January 25, 1950 (R. 53). The petition was filed on January 25, 1950 and certiorari was granted on March 13, 1950 (R. 54) (339 U. S. 910).

The jurisdiction of this Court is conferred by Section 1254(1) of Title 28 of the United States Code.

Statutes and Orders Involved

1. Section 9A of the Hatch Act (Act of August 2, 1939, c. 410, § 9A, 53 Stat. 1148, 5 U. S. C. A. § 118j):

> "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."

2. The pertinent provisions of Executive Order 9835 (12 FR 1935, 3 CFR (1947 Supp.) Ch. II, 129):

(a) Preamble.

> "Now, THEREFORE, by virtue of the authority vested in me by the Constitution and Statutes of the United States, including the Civil Service Act of

1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows":

(b) Part III, Section 3.

"The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies."

(c) Part V.

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to

alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

Statement

The instant action was brought for declaratory and injunctive relief by the Joint Anti-Fascist Refugee Committee (hereinafter referred to as "JAFRC"), an unincorporated association, located in New York City, N. Y., against Tom C. Clark, the then Attorney General of the United States,* Seth W. Richardson, Chairman of the Loyalty Review Board of the Civil Service Commission, and the other members of that Board. Respondents were named in their capacity as individuals. Petitioner sought to

* By an order of the Court of Appeals for the District of Columbia Circuit dated and filed October 14, 1949, J. Howard McGrath, Attorney General of the United States, was substituted as a party-appellee herein in the place and stead of appellee Tom C. Clark (R. 50).

remedy and enjoin certain action of respondents taken pursuant to Executive Order 9835, the so-called "Loyalty Order," which the petitioner declares to be unconstitutional.

The first cause of action alleges that the JAFRC has conducted relief activities, under governmental supervision (R. 2), since its inception in 1942 for the benefit of anti-fascist refugees who had fought with and assisted the duly constituted government of Spain in its opposition to the efforts of Francisco Franco to overthrow that government by armed force (R. 3). The JAFRC assisted in the release of such refugees from concentration camps and arranged for their transportation, asylum and other aid; and at the present time the JAFRC is principally devoted to aiding such anti-fascist refugees by supplying them with money, food, clothing, and medical assistance (R. 3, 11-21). A total of $1,011,448.00 in cash and $217,903.00 in kind was disbursed by the JAFRC from 1942 through 1947 for relief (R. 3). The funds for these relief activities were raised at social affairs, rallies, meetings, dinners, theatre parties, etc., conducted by the JAFRC, so that petitioner's ability to carry on its relief work is based upon the good will of the American people which it has enjoyed (R. 3).

The petitioner's work has been and will continue to be seriously and irreparably damaged by actions of the respondents purportedly performed pursuant to Executive Order 9835 (R. 4). That Order was issued on March 25, 1947 and recited that it was based upon the President's constitutional powers and upon powers delegated by the Congress (R. 4). The stated purpose of Executive Order 9835 was to establish standards and machinery for determining the loyalty of federal civil service employees and applicants (R. 4). It provided for the establishment of the Civil Service Commission Loyalty Review Board which was to be furnished by the Department of Justice with, and was to disseminate to all departments and agencies,

the name of each foreign or domestic organization, association, movement, group, or combination of persons which the Attorney General, after "appropriate investigation and determination," designated as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States or as seeking to alter the form of government of the United States by unconstitutional means" (R. 5). Membership in, affiliation with, "or sympathetic association with any" such designated "organization, association, movement, group or combination of persons" could, under the Order, "be considered in connection with the determination of disloyalty" (R. 4-5).

On November 24, 1947, in a letter to the respondent Seth W. Richardson, the then Attorney General Tom C. Clark listed the petitioner, among 90 others, as an organization, membership in, affiliation or sympathetic association with which could be the basis for a finding that an applicant or employee is "disloyal"; petitioner never received any notice or hearing concerning such designation (R. 5), and on December 4, 1947, the respondent Richardson released that letter to be publicized (R. 6).

The publication of that letter caused petitioner serious injury. As a direct result of the dissemination of the designation of the petitioner: the Bureau of Internal Revenue announced that it had revoked its ruling classifying the JAFRC as a tax-exempt organization (R. 6, 22); contributors, especially present and prospective civil servants, reduced or discontinued their contributions to the petitioner (R. 6, 22-27); licenses required for the solicitation of funds were refused the JAFRC (R. 6); meeting places and facilities necessary for the conduct of the JAFRC fund-raising activities were denied to the petitioner (R. 6, 25-27); and the taint placed by the respondents upon the JAFRC lost the organization the support of speakers,

entertainers, members and other participants (R. 6, 24). In response to a letter sent by Helen R. Bryan (R. 22), the JAFRC Executive Secretary, the various local chapters in Chicago (R. 22), Seattle (R. 22-23), San Francisco (R. 23), Philadelphia (R. 23) and Boston (R. 24-25) have indicated that the injurious effect of the Attorney General's appellation of the JAFRC as "subversive" has been nationwide.

The complaint further alleges that the acts of the respondents were without warrant in law and deprived petitioner of its rights in violation of the Constitution (R. 7); and that Section 9A of the Hatch Act and Executive Order 9835 are repugnant to the First, Fifth, Ninth, and Tenth Amendments to the United States Constitution (R. 7).

Upon these allegations and upon the recitation of other appropriate jurisdictional requirements (R. 7-8), the first cause of action prays for a declaratory judgment (R. 8) and the second cause of action prays for injunctive relief (R. 8-9).

The prayer for relief requests: (1) a declaration that Executive Order 9835, and Section 9A as applied by Executive Order 9835, are unconstitutional; and (2) a permanent and temporary injunction:

> (a) restraining the further dissemination by respondents of the name of petitioners as a designated organization;
>
> (b) directing respondents to remove petitioner's name from the list of designated organizations and to make a public statement thereof;
>
> (c) restraining respondents from taking any other action which may be based upon the inclusion of petitioner's name in the list of designated organizations (R. 8-9).

Simultaneously with the service of the complaint, petitioner moved for a three-judge court pursuant to 28 U. S. C. § 2282 and for a preliminary injunction (R. 2, 9-11). Respondents cross-moved to dismiss the complaint (R. 28). All the motions were argued before District Judge LETTS who, after denying the application for a three-judge court, proceeded directly to hear and consider the other motions. The motion to dismiss was granted and the injunction denied, without opinion, by order filed June 4, 1948 (R. 28-29). Thereafter an appeal to the United States Court of Appeals for the District of Columbia Circuit was duly instituted.

The appeal in the Court of Appeals was argued on March 16, 1949, and on August 11, 1949, the ruling of the District Court was affirmed, EDGERTON, *J.*, dissenting (R. 29-48).

The majority opinion, written by PROCTOR, *J.*, and concurred in by CLARK, *J.*, found that "the complaint does not present a justiciable controversy" (R. 32) for the reason that, according to the majority of the Court, the action of the Attorney-General in designating the JAFRC was performed as the *alter ego* of the President in a matter wherein the action of the President was not subject to judicial review (R. 32-33) and imposed "no obligation or restraint" upon the JAFRC (R. 32) but caused the JAFRC "at most", only indirect and incidental injury (R. 34). The majority opinion proceeded further, "in view of the number of cases in this jurisdiction attacking validity of the loyalty program" (R. 35), to state briefly its views that Section 9A of the Hatch Act (R. 35), Executive Order 9835 (R. 35-36), and the action of respondents complained of are valid (R. 36); and that "nothing in the Hatch Act or the loyalty program deprives the Committee or its members of any property rights . . . Freedom of thought and belief is not impaired" (R. 36).

The dissenting opinion found that the action of the respondents was unauthorized by Executive Order 9835, be-

cause of the failure to accord petitioner notice and hearing, and, further, that said action was beyond the scope of Section 9A of the Hatch Act, because, upon the conceded allegations of the complaint, the JAFRC is not an organization comprised within the terms of said Section 9A (R. 39-40); that as respondents found and publicly stigmatized petitioner as "subversive" without notice or hearing, respondents' action was invalid on constitutional grounds (R. 40-41); that the action complained of was invalid because it impaired and abridged First Amendment rights although, upon the record before the Court, no constitutionally sufficient reason therefor appeared (R. 41-43); that petitioner had standing to sue for injury to its reputation, impairment of First Amendment rights, and loss of contributions resulting from respondents' actions (R. 43-44); and that the equity jurisdiction of the Court allowed judicial review of and relief for the action of respondents here complained of (R. 44-48).

Questions Presented

1. Whether the defamatory designation of petitioner together with the publication and circularization of that designation by respondents, concededly resulting in injury to the reputation of the organization and to its members, loss of contributions to and support of the organization, the denial of fund solicitation licenses to petitioner, the revocation of the organization's tax-exempt status by the Bureau of Internal Revenue, and the abridgement and impairment of the exercise of First Amendment rights by the organization, its members and all others similarly situated, presents a justiciable controversy.

2. Whether the stigmatizing designation of the JAFRC, deemed a conclusive determination in connection with the administration of Executive Order 9835 by respondents, presents a justiciable controversy.

3. Whether the stigmatizing and disseminated designation of the JAFRC by respondents is a reviewable exercise of executive power.

4. Whether the stigmatizing designation of the JAFRC by respondents and the public dissemination thereof by respondents to the injury of property and constitutional rights of petitioner and its members is a privileged official communication with respect to which no cause of action for injunctive or other equitable relief is available.

5. Whether petitioner, an unincorporated association suing in its organizational name on behalf of all its members pursuant to Rule 17(b)(1) of the Federal Rules of Civil Procedure, has standing to assert that the action of respondents abridges property and constitutional rights of petitioner and its members in violation of the First, Fifth, Ninth and Tenth Amendments to the United States Constitution.

6. Whether Executive Order 9835, in authorizing the public stigmatizing designation of organizations by the Attorney General of the United States without notice or hearing to those organizations, without any clearly defined standards to guide or delimit respondents in making such designation, without requiring any findings or conclusions to support such designation, and without according designated organizations any administrative or judicial review of that designation, violates: (a) the Ninth and Tenth Amendments to the United States Constitution in that it asserts powers not delegated to the Federal Government but reserved to the people and the States by the United States Constitution; (b) the Due Process Clause of the Fifth Amendment to the United States Constitution in that it unreasonably and unjustifiably abridges First Amendment rights of petitioner, its members, and all others similarly situated; and (c) the Due Process Clause of the Fifth

Amendment to the United States Constitution in that the Order on its face and as applied herein by respondents fails to accord to petitioner and others similarly situated the procedural rights and safeguards provided by that Amendment.

Specification of Errors

1. It was error for the Court of Appeals for the District of Columbia Circuit to affirm the order of the District Court granting the motion of respondents to dismiss the complaint.

2. It was error for the Court of Appeals for the District of Columbia Circuit to affirm the order of the District Court denying the motion of petitioner for a temporary injunction.

Summary of Argument

The sole, unlimited and unreviewable discretion accorded the Attorney General by Executive Order 9835 to adjudge and label organizations "subversive" without notice or hearing impairs and restrains the First Amendment rights of every individual in or contemplating federal employment; of every present or contemplated organization named, to be named, or capable of being named "subversive"; and of every person who has past, present, or contemplated membership, affiliation, or "sympathetic association" with an organization subject to designation at the pleasure of the Attorney General. Such unprecedented power violates the prohibitions contained in the First, Fifth, Ninth and Tenth Amendments to the United States Constitution.

There is no delegation of executive power in the Constitution which authorizes Executive Order 9835. In sus-

taining the Executive Order which permits the Attorney General to dictate what is orthodox and proper in the area of thought, expression and association, the Court below contravened the injunction of *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642, that in no instance does the Constitution delegate such power to an official, "high or petty." Nor may Executive Order 9835 be sustained as executive action in aid of legislation for the Order is not expressly or impliedly authorized by any legislation and, indeed, is in conflict with Section 9A of the Hatch Act. And irrespective of the constitutional source which may be claimed for Executive Order 9835, the Order is invalid for on its face and as applied it punishes civil service employees for their thoughts, beliefs, expressions, and association; it subjects designated organizations and their membership to defamation, to economic loss, to loss of good will, to loss of essential privileges, to loss of membership and support; and it imposes a prior restraint upon all organizational First Amendment activities. As this cause comes before the Court upon a motion to dismiss, it is decisive that nowhere in the record herein does it appear or is it claimed that the restraints and abridgments by respondent of activities protected under the First Amendment are based upon a clear and present danger to the civil service or our national security. Moreover, the facts *dehors* the record confirm that there is no basis for the extraordinary and repressive measures here complained of. The failure of Executive Order 9835 to require the Attorney General to grant a hearing, review, or other procedural safeguards to designated organizations further demonstrates that the Executive Order is in violation of the Fifth Amendment.

The instant cause properly raises and presents for adjudication the foregoing constitutional contentions. A justiciable controversy arose from the issuance by respondents of a defamatory blacklist which included the petitioner-

organization. Moreover, as that list is a final and irrevocable administrative determination of the petitioner's status, for the purposes of the loyalty program, which induces present and prospective federal civil servants to sever their association with the JAFRC under threat of dismissal and proscription from federal employment, the ruling of the Court below that there is here no justiciable controversy is in conflict with the decision of this Court in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407. And the validity of the action of respondents which thus creates a justiciable controversy is the subject of judicial review as it affects private property and constitutional rights and does not involve a political question; the circumstance that the action complained of includes that of a cabinet officer purporting to exercise primary executive power is immaterial, for equity jurisdiction has frequently been extended to cabinet officers and executive power is no more immune from judicial review as to constitutionality than any other form of governmental action. Nor may respondents foreclose judicial inquiry into the constitutional propriety of their blacklist by characterizing it as a privileged official communication which will not found an action in libel; the complaint seeks declaratory and equitable relief, not money damages from respondents, and, therefore, the doctrine of privileged official communication here affords no basis for a dismissal. And, finally, the applicable decisions of this Court make plain that petitioner, an unincorporated association, has standing to raise the First Amendment issues here presented particularly since, as a matter of substantive law, petitioner represents the aggregate of the personal and property rights of its membership and sues in its organizational name only as a matter of procedural convenience pursuant to Rule 17(b)(1) of the Federal Rules of Civil Procedure.

ARGUMENT

I

This Court has jurisdiction to determine the constitutionality of Executive Order 9835.

A. The Issues Here Presented Are Justiciable

Respondents have "branded as subversive"* and, in the enforcement of Executive Order 9835, have treated the JAFRC as "disloyal" to the United States Government so that a federal employee may be dismissed or an applicant may be refused federal employment as "disloyal" if he maintains even a "sympathetic association" with the JAFRC. The uncontroverted complaint and affidavits allege that as a result substantial property and constitutional rights of the JAFRC and its members have been and will continue to be impaired; that respondents' action was purportedly done pursuant to Executive Order 9835; that the Order is unconstitutional; and that the relief sought will mitigate the wrongful injuries already inflicted and will prevent threatened further injuries from eventuating. The Court below ruled, however, that the foregoing record presented no justiciable controversy in that the action of respondents imposed "no obligation or restraint" upon the petitioner but was merely the furnishing "of information and advice" which injured the JAFRC only "incidentally" or "indirectly".

If the designation of the JAFRC as "subversive" had been uttered by a private individual it would plainly have

* Prior to the release of the first list of organizations, the then Attorney General announced that the list would be published in thirty days in order to "enable investigators to trace suspected disloyal federal employees from membership in organizations branded as subversive." *NY Times*, June 1, 1947, p. 38, col. 3.

been justiciable and, indeed, actionable *per se*.* Similarly, the dissemination and implementation of a blacklist by a private employer is actionable at common law** and criminal by statute in many jurisdictions.***

> ". . . it is clear that the effect of blacklisting may be the same as if blacklisted persons were subject to legal punishment on accusation of acts not forbidden by general law and without opportunity to disprove or justify—a power which American constitutions deny even to government. It is felt that it is only by due process of law that a person may properly be subjected to a serious penalty or stigma, and there is an accentuated ethical revulsion from the concurrence of public officials in extralegal discriminations."
>
> Nelles, "Blacklist", 2 *Encyc. Soc. Sci.* (1944 ed.) 576, 577.

The injury to reputation and other justiciable, legally protected interests which would have been suffered by the petitioner if it had been defamed as "subversive" or "disloyal" by a private individual or employer is aggravated by the circumstance that the stigmatizing utterance was made by the highest law enforcement agent of the United States Government.**** For where "the hearer is in his

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* *Grant* v. *Readers Digest Association*, 151 F. 2d 733, cert. den., 326 U. S. 797; *Mencher* v. *Chesley*, 297 N. Y. 94; *Kaminsky* v. *American Newspapers, Inc.*, 283 N. Y. 748; *Spanel* v. *Pegler*, 160 F. 2d 619; *Wright* v. *Farm Journal*, 158 F. 2d 976.

** *Blumenthal* v. *Shaw*, 77 F. 954; *Hundley* v. *Louisville & N. R. Co.*, 105 Ky. 162, 48 SW 429; *Willis* v. *Muscogee Mfg. Co.*, 120 Ga. 597, 48 SE 177; *Willner* v. *Silverman*, 109 Md. 341, 71 A. 962; *Masters* v. *Lee*, 39 Neb. 574, 58 NW 222; see 4 LRA (NS) 1118 (1904); Fitch, "Labor Blacklist", 2 *Encyc. Soc. Sci.* (1944 ed.) 578, 579.

*** *State* v. *Dabney*, 77 Okl. Cr. 331, 141 P. 2d 303; *Scheffer* v. *Justus*, 85 Minn. 279, 88 NW 759; *Johnson* v. *Stevedoring Co.*, 128 Ore. 121, 270 P. 772; *Mattison* v. *Lake Shore & MS Ry. Co.*, 3 Ohio Dec. 526; *Dick* v. *Northern Pac. Ry. Co.*, 86 Wash. 211, 150 P. 8.

**** The Attorney General must have appreciated the devastating consequences of the publication of his blacklist and finally did so only after considerable vacillation and indecision. Thus, although no provision is made in the Order for the public circularization of the list, from the very beginning

power" the language of the speaker may "have a force independent of persuasion." *N. L. R. B.* v. *Federbush Co.*, 121 F. 2d 954, 957 (L. HAND, *J.*); see also Note, 43 *Columbia Law Rev.* 837, 942-943.

The Court below referred to three attributes of the Executive Order and the blacklist as factors determining the justiciability of this cause: (1) the blacklist was considered to contain no command to anyone to do or to refrain from doing any act; (2) neither the Order nor the blacklist was directed or addressed to the JAFRC and whatever quality as a mandate the Order or the list contained was directed to persons other than the JAFRC; and (3) the cause was not ripe for adjudication in that the blacklist was merely advice and information to be used in connection with subsequent administrative proceedings.

Upon analysis it can be seen that these three factors, neither separately nor in the aggregate, sustain the ruling of the Court below.

The essence of a justiciable controversy is not the form assumed by injurious action but the infliction of injury upon a legally protected right. Cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125. It is a basic principle of equity jurisdiction that unauthorized action by a public official causing injury to a legally protected right gives rise to a justiciable issue (*Philadelphia Company* v. *Stim-*

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requests were made that the list be made public. *NY Times*, March 26, 1947, p. 27, col. 7; April 12, 1947, p. 19, col. 5; see also HR Rep. 616, 80th Cong., 1st Sess. (1947) 4; Hearings on HR 3588, 80th Cong., 1st Sess. (1947) 97, 106, 112, 114. Section 8(c) of HR 3818, 80th Cong., 1st Sess. (1947), the Rees Bill which was under consideration before the Congress as an alternative to Executive Order 9835, required publication in the Federal Register of those organizations designated by the Attorney General. At first the Justice Department expressed doubt that the list would ever be made public; "they fear such action would put listed organizations on their guard and lead them to change their names, thus making necessary a whole new inquiry." *NY Times*, April 13, 1947, p. 10, col. 1. On May 10, 1947 the Attorney General publicly stated that he was not decided as to whether the list would be made public. *NY Times*, May 11, 1947, p. 35, col. 3. About three weeks thereafter the Attorney General publicly announced the imminent disclosure of his blacklist. *NY Times*, June 1, 1947, p. 38, col. 3. Six months later the first list was published. *NY Times*, December 5, 1947, p. 1, col. 4.

son, 223 U. S. 605; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Ex Parte Young*, 209 U. S. 123; *Hays* v. *Seattle*, 251 U. S. 233; *Bell* v. *Hood*, 327 U. S. 678, 684; see *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U. S. 118, 137); whether that action consists of some express compulsion or deprivation is inconsequential. And so this Court has recently held that the certification of a union as a "bargaining agent" gave rise to a justiciable controversy and declared that "the fact that Wisconsin's certification was not in the form of a command is immaterial." *LaCrosse Telephone Corp.* v. *Wisconsin E. R. B.*, 336 U. S. 18, 23-24. Similarly in *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, it was held that the determination by the Interstate Commerce Commission that a certain railway was not an interurban electric railway was the basis for review in a court of equity although no command was part of that determination. See also *Waite* v. *Macy*, 246 U. S. 606; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *Red Canyon Sheep Co.* v. *Ickes*, 69 App. D. C. 27, 98 F. 2d 308. The full answer to the view that administrative action must be in the form of a command to attain justiciability was supplied by STONE, *C. J.*, in *A. F. of L.* v. *N. L. R. B.*, 308 U. S. 401, 408:

> "Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be re-examined by courts under particular statutes providing for the review of 'orders'."

Nor is justiciability dependent upon whether the governmental action complained of directs a certain course of conduct by the complaining party or others. Again the criterion is whether injury to legal rights has been suffered. It has therefore been repeatedly held, in contrast with the ruling below, that a statute or an administrative ruling may be challenged by an individual who has not thereby

been commanded to perform or refrain from any acts where that statute or ruling adversely affects the interest of the complaining party because it directs or induces others to action injurious to the complaining party. *Stark* v. *Wickard*, 321 U. S. 288, 303; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; *Pierce* v. *Society of Sisters of Holy Names*, 268 U. S. 510; *Buchanan* v. *Warley*, 245 U. S. 60; *Truax* v. *Raich*, 239 U. S. 33; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Martin* v. *Struthers*, 319 U. S. 141, 146. And the standing of the complaining party is not affected by the fact that the relationship thus impaired is one terminable at will (see, *e. g.*, *Truax* v. *Raich*, *supra*; *Pierce* v. *Society of Sisters of Holy Names*, *supra*); it is sufficient that the impairment of the relationship results in injury to a legally protected interest of the complaining party.

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards . . ., the regulations operate to alter and affect adversely appellant's contractual rights and business relations. . . ." *Columbia Broadcasting System* v. *United States*, *supra*, at 422.

We turn them to the argument that the Attorney General's blacklist creates no justiciable controversy because it is said to be mere advice and information constituting, at most, only a step in the administration of the Executive Order.

To the extent that this contention depends upon characterizing the blacklisting of the JAFRC by the Attorney General as the mere dissemination of advice and information, it need not long detain the Court. This case is not *Standard Scale Co.* v. *Farrell*, 249 U. S. 571, where the results of an investigation by the New York Superintendent

of Weights and Measures concerning scales were published and distributed by him in a bulletin without any direction to officers or individuals to take any action on the basis of these findings. Here there was undoubtedly the dissemination of "information" by the Attorney General and the Loyalty Review Board; but there was also "something more". *Columbia Broadcasting System* v. *United States, supra,* at 422. The listing of proscribed organizations by the Attorney General was no casual, informal statement. The Attorney General prepared the organization-blacklist pursuant to the instruction contained in Part III, Section 3 of Executive Order 9835. The Order provided for the dissemination of that list by him to the Loyalty Review Board and then by that Board to all departments and agencies. On December 5, 1947, the blacklist, which had been previously furnished by the Attorney General to the Loyalty Review Board, was sent by the latter to the various federal departments and agencies administering Executive Order 9835 and at the same time the list was made the subject matter of a press release which, of course, received fulsome coverage in the press of the entire nation. *N. Y. Times,* December 5, 1947, p. 1, col. 4. Thereafter additions were made to that list and in each instance the new list was broadcast to the nation by means of press releases. *N. Y. Times,* May 29, 1948, p. 1, col. 2; April 28, 1949, p. 6, col. 4; *N. Y. Herald-Tribune,* September 16, 1950, p. 5, col. 6.

Nor did the publicizing of the list of organizations terminate with the issuance of a press release. The lists were published and republished in the Federal Register. 13 FR 1471, 1473, 3067-3068, 6135-6138, 9361, 9364-9376; 14 FR 2371, 4707-4708, 6077; 15 FR 6191. And the lists appeared again in the official Code of Federal Regulations. 5 CFR (1949 ed.) ch. II, Part 210, App. A., 200-202, 203-205; 5 CFR (1950 Supp.) ch. II, Part 210, App. A, 50-51. The blacklist of organizations was thus printed and reprinted in those organs which contain the official executive direc-

tives. The blacklists were not so recorded nor were they forwarded to the Loyalty Review Board and thence to all federal departments and agencies as academic, informative material. Under the Order the lists are to be used in the determination of the loyalty of employees and applicants (Part V, Section 2f); and loyalty boards are instructed not to "enter upon any evidential investigation . . . for the purpose of attacking, contradicting or modifying the controlling conclusion reached by the Attorney General" as to the designation of an organization. Memorandum No. 2 of the Civil Service Commission Loyalty Review Board, March 9, 1948; see also Memorandum No. 12, June 23, 1948; 13 FR 9368; *IWO* v. *McGrath*, 182 F. 2d 368, 374; Emerson & Helfeld, "Loyalty Among Government Employees", 58 *Yale Law J.* 1, 116 n. 430. Formally made, officially recorded, and deemed final and authoritative, the Attorney General's blacklist serves as a guide and mandate to further government action.

That the action which injured the IAFRC took the form of publicity and did not assume the more formal, orthodox and traditional forms of government action is immaterial. The development of new techniques of governmental action should not put a party out of court. The peculiar genius of equity jurisdiction is its flexibility and its adaptability, for the safeguarding of individual rights to new modes of governmental action. *Bell* v. *Hood*, 327 U. S. 678, 684. It is imperative that equity principles be applied to the publicity technique which has been increasingly employed by government as a sanction or regulatory device. For ostracism is a damaging penalty and a potent deterrent. The Constitution itself is replete with safeguards with respect to official judgments which would cause the party judged to be socially or politically ostracized. *United States Constitution*, Article I, §§ 3 (cl. 6, 7), 9 (cl. 3), 10 (cl. 1); Article III, §§ 2 (cl. 3), 3; Amendment V; Amendment VI; Amendment XIV, § 3. ". . . the usefulness of mere publicity as

a means for coercing action"* has been observed and the status of publicity as an instrument of governmental action, generically related to imprisonment, fines, licensing powers and other sanctions, has come to be recognized.**

> "Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *United States* v. *National Association of Real Estate Boards,* 339 U. S. 485, 489.

VINSON, *C. J.*, while on the Court of Appeals for the District of Columbia Circuit, declared in *Glass* v. *Ickes,* 117 F. 2d 273, 278 n. 9, cert. den., 311 U. S. 718, that "Public announcements may well, on occasion, be 'an action which may properly constitute an aid in the enforcement of the law' ".

This Court has plainly indicated its awareness that the dissemination of a stigmatizing official judgment by an agency of government may be subject to the limits imposed upon other forms of government action. In *Keegan* v. *United States,* 325 U. S. 478, the Court had before it a section of the Selective Service Act which provided that it was "the expressed policy of the Congress" that vacancies caused in private employment by induction "shall not be filled by any person who is a member of the Communist Party or the German-American Bund" (50 U. S. C. App. § 308(i)). No further compulsion or sanction was contained in that section. The Government conceded that the aforesaid provision was unconstitutional, but maintained its unconstitutionality could be ignored on the grounds that the aforesaid provision was a mere "admonition." Mr. Justice BLACK, in a concurring opinion, disposed of this contention very briefly.

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* Landis, *The Administrative Process* 90.

** See, *e.g.*, Landis, *op. cit. supra,* at 90, 108-110; President's Committee on Civil Rights, *To Secure These Rights* 32; Commissioner of Investigation of the City of New York, *Annual Report* (1938) 13; Davis, "The Administrative Power of Investigation," 56 *Yale Law J.*, 1111, 1136; Note, 47 *Columbia Law Rev.* 416, 418.

> "It has been urged that these defendants had no legitimate reason to protest against these provisions because they were obviously unconstitutional and amounted to no more than an admonition; *but they were an admonition sounded by the highest legislative body of the nation*" (325 U. S., 497 italics added.)

And thereafter Mr. Justice BLACK indicated that the aforesaid provision violated the Bill of Attainder prohibition of the Constitution.

In *United States* v. *Lovett*, 328 U. S. 303, the Congress provided.

> ". . . in § 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House Bill, that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 14, 1943 again appointed to jobs by the President with the advice and consent of the Senate" (328 U. S., 305).

The Congressional Counsel urged that no justiciable constitutional issue was presented in an action by respondents to recover salaries earned but not paid. The argument was rejected and the statute involved was thereafter held to be unconstitutional.

> "Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result" (328 U. S., 314).

To the extent that the contention under consideration depends upon the characterization of the Attorney General's blacklist as a "preliminary" administrative step, even if it is "something more" than advice and information, different questions arise. For it may be assumed,

arguendo, that not all administrative actions causing injury to legally protected interests are justiciable. Certain kinds of preliminary processes cause injury but yet are non-justiciable. *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299. As Mr. Justice DOUGLAS stated in *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 599:

> "The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination."

But it does not follow that every preliminary administrative determination which may be the basis for future administrative action is non-justiciable. The promulgation of rules by an administrative agency which guide future action may create a justiciable issue. *Waite* v. *Macy*, 246 U. S. 606 (HOLMES, *J.*); *Columbia Broadcasting System* v. *United States*, 316 U. S. 407; see also Administrative Procedure Act, §§ 2(c), 2(g) (5 U. S. C. A. §§ 1001 (c), (g)). More particularly, the fixation of the status of an individual or concern by an agency to govern future administrative or other action has been deemed reviewable and, therefore, justiciable. In *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, the Court had before it the designation of the complainant by the Interstate Commerce Comission as a non-inter-urban electric railway. Concededly, the designation of the railway by the Commission was not reviewable as an order (*Shannahan* v. *United States*, 303 U. S. 596),

and the designation was not made "for the purposes . . . of further proceedings by the Commission itself" (305 U. S., 183). The action was nevertheless entertained for the reason that the designation was "part of a regulatory scheme" under the Railway Labor Act (*id.*)* and for the further reason that the applicability of other legislation to the railway was premised upon "the same criterion" of whether it was an interurban railway (305 U. S., 184).** HUGHES, *C.J.*, concluded:

> "In these circumstances we think respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status" (305 U. S., 184).

Again in *LaCrosse Telephone Corp.* v. *Wisconsin E. R. B.*, 336 U. S. 18, this Court held that the designation of a union as a "bargaining agent" could give rise to a justiciable controversy although that certification did not order any action or inaction by the complaining employer and although that certification might be reviewed and set aside in a subsequent administrative or judicial proceeding.

> ". . . Wisconsin's certification . . . was not an abstract determination of status. Nor was it merely an interim adjudication in an uncompleted administrative process. It established legal rights and relationships. It told the employer, subject to judicial review, with whom he could not refuse to negotiate without risk of sanctions. The character of the certification was therefore such as to make it reviewable under the appropriate standards for exercise of the federal judicial power" (336 U. S., 23-24).

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* Compare this aspect of the *Shields* case with the utilization of the Attorney General's list by the departmental and agency loyalty boards and the Loyalty Review Board.

** Compare this aspect of the *Shields* case with the utilization of the Attorney General's list by other agencies such as the Bureau of Internal Revenue and state licensing agencies.

A line of distinction between justiciable and non-justiciable "preliminary" administrative action emerges from the foregoing. The non-justiciable "interim adjudication in an incompleted administrative process" contemplates the possibility of further administrative or other action wherein the adjudication may be accepted or rejected. Until the completion of the administrative process the impact of the "interim adjudication" is therefore uncertain and judicial intervention before that point would interfere would the exercise of the executive discretion concerning the use of that adjudication. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. But where a status is fixed, and "not made subject to future administrative determinations" (*Columbia Broadcasting System* v. *United States, supra,* at 420) and where status thus fixed informs those affected "with whom" they may or may not "negotiate without risk of sanctions" (*LaCrosse Telephone Corp.* v. *Wisconsin E. R. B.*, 336 U. S. 18, 24), a justiciable controversy is created.* The applicability of such final and binding acts of status-fixing

> "to all who are within their terms does not depend upon future administrative action. Instead they operate to control such action and to determine in advance the rights of others affected by it." *Columbia Broadcasting System* v. *United States, supra,* at 420.

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* Predicating justiciability or reviewability of "preliminary" administrative action upon the completion of the administrative process, as did the dissent in *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, 429, must presuppose that upon the completion of that process the issue preserved, if otherwise justiciable, would then be "ripe for judicial review" (*id.*, at 433). "It is sufficient . . . that there is at some stage an opportunity for a hearing and a judicial determination." *Ewing* v. *Mytinger & Casselberry, supra,* at 599. In this view of justiciability it is appropriate here to inquire when, so far as *petitioner* is concerned, does the action of the Attorney General become justiciable? When does the administrative process, if it is now "incomplete", become complete? Is it when the administration of Executive Order 9835 is "completed"? If so, then this controversy may never be justiciable for the program is a continuing one applicable to applicants; or judicial review is thereby postponed to a time when effective relief is no longer possible. Is it as soon as one or more employees or applicants are found "disloyal" for membership in, affiliation or sympathetic association with the JAFRC? If so, then again this controversy may never be justiciable for the Executive Order does not require reasons to be stated for determinations of

The designation of the petitioner by the Attorney General as a subversive organization comes within the principle of those cases which held that an administrative determination which is a final and binding fixation of status for the purpose of future administrative and other action is justiciable if it has a present injurious effect upon legally protected rights. *Shields* v. *Utah Idaho Central R. R. Co., supra; Columbia Broadcasting System* v. *United States, supra; La Crosse Telephone Corp.* v. *Wisconsin E. R. B.*, supra. See Emerson & Helfeld, *op. cit. supra*, 119-120; Note, 48 *Columbia Law Rev.* 1050, 1053-1054. For, as has been pointed out (see pp. 18-20, *supra*), the findings made and disseminated by the Attorney General as to whether an organization is disloyal or subversive are deemed fixed, final and mandatory in the administration of the Executive Order.*

"disloyalty" and, as organizational activities are purported to be "only one piece of evidence" in such determinations (see 13 FR 253, 254), this premise for justiciability would be virtually incapable of proof. In short, if the issues here involved are otherwise justiciable, they must be considered ripe for adjudication now or they will probably never attain such maturity. Certainly insofar as petitioner is affected by the Attorney General's blacklist, the administrative process was "completed" when that list was disseminated and deemed final for the purposes of the administration of Executive Order 9835. No administrative recourse was available to petitioner, or to any individual, to challenge the designation of the JAFRC as "disloyal" and no other further administrative proceedings were or are contemplated under the Order with respect to such designation.

* The list also had the effect of fixing the status of the JAFRC for other purposes. In one instance the Bureau of Internal Revenue declared the organization to be non-tax-exempt (*NY Times*, February 3, 1948, p. 21, (R. 26); see also *NY Times*, October 22, 1948, p. 17, col. 1, for additional listed organizations which lost tax-exemptions). The Congress has shown its understanding that so far as tax-exemptions are concerned the action of the Attorney General has finally fixed the status of the JAFRC. S. 4130, 81st Cong., 2d Sess. (1950) § 2(a) (3) (B) provided:

> ". . . certain administrative practices of agencies . . . have been useful in providing further protection . . . including . . . the internal-revenue laws, under which exemption from taxation under Section 101 of the Internal Revenue Code is denied to certain organizations determined by the Attorney General to be subversive, and under which contributors are denied deductions for their contributions to such organizations."

Similarly, it was administratively determined that in view of the petitioner's inclusion on the list submitted to the Loyalty Review Board by the Attorney General, the organization could not be deemed a proper one by the Pennsylvania Department of Welfare for registration for a certificate to solicit funds (R. 23).

As the designation of the JAFRC by the Attorney General is final and binding, particularly so far as the administration of Executive Order 9835 is concerned, the listing of the JAFRC is more than a statement which is merely defamatory or deprecatory in nature. It is an adjudication on the basis of which sanctions of the gravest type can be and are imposed. It fixes the status of the JAFRC finally for loyalty purposes and it informs every civil servant that membership in, affiliation with, or sympathetic association with the organization exposes that civil servant to dismissal for disloyalty. Indeed, the principal purpose for the publication of the list was to put civil service employees and applicants on notice that "association" with the JAFRC will result in ineligibility. See R. 7; *NY Times*, March 26, 1947, p. 27, col. 7; HR Report 616, 80th Cong., 1st Sess. (1947) 4. Under pain of loss of job and the stigma of disloyalty, no present or prospective civil servant can venture to maintain the barest connection with the JAFRC. The action of the Attorney General is therefore no "interim" administrative report or investigatory finding—it is a determination enforceable and enforced by governmental action and sanctions. According to *Columbia Broadcasting System* v. *United States*, the justiciability of such a determination is beyond dispute even though that determination does not directly command action or inaction by the complaining party. As the administrative rule in *Columbia Broadcasting System* caused the parties directly governed by the rule to sever their relationships with the complaining party under threat of future governmental sanctions or action, so the designation of the JAFRC by the Attorney General has caused present or prospective civil servants to sever their connection with the JAFRC under the threat of dismissal as "disloyal" by the United States Government; in short, as the FCC rule created a justiciable issue in *Columbia Broadcasting System*, so the action of respondents has here resulted in a justiciable issue.

B. Executive Order 9835 and the Action of Respondents Thereunder Are Reviewable

The rights of the JAFRC here impaired are not only recognized property rights, but also include constitutional rights of freedom of thought, expression and association;* and the wrong committed was not merely an error in the exercise of official discretion, but the assertion of a power which exceeds the constitutional power of the executive.** Such circumstances have traditionally been deemed sufficient to invoke equity jurisdiction. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *Ickes* v. *Fox*, 300 U. S. 82, 96, 97; *Ex Parte Young*, 209 U. S. 123; see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 689-691, 710, 712-716, 731-732. But the Court below held that the Attorney General here acted as the *alter ego* of the President and that the action of the Attorney General was as nonreviewable as the action of the President would have been if he had acted himself (R. 32-33).

This is not an action against the President of the United States; he is not named as a party nor is he an indispensable party to the action. Cf. *Williams* v. *Fanning*, 332 U. S. 490. The circumstance that he promulgated Executive Order 9835 no more renders this a suit against the President than the circumstance that the Congress enacts a law renders a suit challenging the validity of that law a suit against the Congress. Indeed, as Executive Order 9835 has distinctively legislative features,*** the analogy sug-

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* *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, cited below (R. 34), and *Tennessee Electric Power Co.* v. *T. V. A.*, 306 U. S. 118, did not involve the impairment of legally protected property or constitutional rights and are, therefore, inapposite here; and *Friedman* v. *Schwellenbach*, 81 App. D. C. 365, 159 F. 2d 22, cert. den., 330 U. S. 838, is likewise of no force here since Friedman's status was merely that of a temporary, conditional civil servant.

** *Decatur* v. *Paulding*, 14 Pet. (U. S.) 497, is a typical instance wherein an alleged error in a matter resting in the administrator's discretion was held non-reviewable.

*** The Rees Bill (HR 3818, 80th Cong., 1st Sess. (1947)) was identical with Executive Order 9835 except in respects not here material.

gested is particularly appropriate. Cf. *Ex Parte Endo*, 323 U. S. 283, 298-300. Jurisdiction exists—and has been exercised—to declare unconstitutional an invalid executive order in a suit brought to enjoin an executive officer from acting pursuant to such order. See, *e.g.*, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

It has never heretofore been held that the action of a cabinet officer is non-reviewable as the action of the President. In fact, instances abound in which equity jurisdiction has been exercised over such cabinet officers. See, *e.g.*, *Philadelphia Co.* v. *Stimson*, *supra*; *Ickes* v. *Fox*, *supra*; *Waite* v. *Macy*, *supra*. That jurisdiction does not dissipate because the wrong or constitutional excess committed by the executive officer is the exercise of executive power allegedly derived from the Constitution as compared with power delegated by the Congress. The doctrine of the supremacy of law had its inception, in Anglo-American law, in the subjection of the executive to judicially defined legal limits. 2 Holdsworth, *History of English Law* (3 ed. 1923) 255; Pound, *Spirit of the Common Law* 60-84; *Case of the Monopolies*, 11 Coke, 84b; *Prohibitions del Roy*, 12 Coke, 63. In *Hurtado* v. *California*, 110 U. S. 516, 531-532, this Court declared:

> "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial".

Similarly, one authority has observed:

> "Within the sphere of his authority under the Constitution, the Executive is independent, and judicial process cannot reach him. But when he exceeds his authority, or usurps that which belongs to one of the other departments, his orders, commands, or war-

> rants protect no one, and his agents become personally responsible for their acts. The check of the courts, therefore, consists in their ability to keep the Executive within the sphere of his authority by refusing to give sanction of law to whatever he may do beyond it, and by holding the agents and instruments of his unlawful action to strict accountability." Cooley, *Constitutional Law* (4 ed. 1931) 203; see also *Story on the Constitution*, § 1842.

This Court has very recently indicated the test applicable to the determination of the validity of the exercise of executive power which is derived from the Constitution.

> "We approach the construction of Executive Order No. 9066 as we would approach the construction of legislation in this field." *Ex Parte Endo, supra*, at 298.

And, accordingly, it appears that the constitutionality of executive agreements, as of treaties, is a proper subject of judicial review. *United States* v. *Pink*, 315 U. S. 203; Littauer, "The Unfreezing of Foreign Funds," 45 *Columbia Law Rev.* 132, 160-169; Note, 48 *Columbia Law Rev.* 890, 897. Even with respect to the executive's vast war powers, it is "well established" that "what are the allowable limits . . . are judicial questions." *Sterling* v. *Constantin*, 287 U. S. 378, 401; see also *Ex Parte Endo, supra*, at 299; *Scherzberg* v. *Madéria*, 57 F. Supp. 42; *Ebel* v. *Drum*, 52 F. Supp. 189. For as "executive action is not proof of its own necessity" (*Duncan* v. *Kahanamoka*, 327 U. S. 304, 336), it rests with this Court to ascertain when the necessity required for constitutionality exists.

It is, therefore, not surprising that, upon occasion, the action of executive officers exercising power purportedly derived from Article II of the Constitution (rather than power delegated by the Congress) has been held by this Court to be invalid. Thus in the great ruling in *Ex Parte Milligan*, 4 Wall. (U. S.) 2, the action there held violative

of the Constitution was that of an executive officer acting pursuant to a mandate of the President as Commander-in-Chief. And in *Humphrey's Executor* v. *United States*, 295 U. S. 602, this Court deemed invalid action by the President which was said to be an exercise of the inherent removal power of the executive—the inherent executive power here asserted by respondents.

To the extent that Executive Order 9835 is, as stated in the preamble thereto, based upon the Civil Service and Hatch Acts and is the exercise of power delegated by the Congress to the President, it is evident that the exercise of that delegated power is the subject matter of judicial review. For if a Congressional enactment governing the activities of employees of the Federal Government may be directly reviewed upon a challenge to its constitutionality (see, *e.g.*, *United Public Workers* v. *Mitchell*, 330 U. S. 75; *United States* v. *Lovett*, 328 U. S. 303), it of course follows that the delegation of power by the Congress to the executive with respect to the federal civil service may also be the subject matter of judicial review (*Panama Refining Company* v. *Ryan*, 293 U. S. 388, 433).

To the extent that Executive Order 9835 is predicated upon some alleged executive constitutional power, the question of its constitutionality as presented in the instant case is a non-political and reviewable question. Here private property and other constitutional rights have been impaired to the detriment of the complaining party. Thus, while a political question may exist where "no case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill" (*Georgia* v. *Stanton*, 6 Wall. (U. S.) 50, 77), or where a state institutes an action as *parens patriae* on behalf of its citizens (*Massachusetts* v. *Mellon*, 262 U. S. 447), or where "the basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity" (*Colegrove* v.

Green, 328 U. S. 549, 552), or where a group of senators institute an action complaining of the method of adopting an amendment to the United States Constitution (*Coleman* v. *Miller*, 307 U. S. 433), or where a Governor of one state seeks to compel the Governor of another state to extradite a fugitive from justice (*Kentucky* v. *Dennison*, 24 How. (U. S.) 66), a justiciable reviewable, non-political question exists here where the complaining party bases its standing upon the impairment of private rights. Willoughby, *Constitutional Law of the United States* (1912) 437. And as the private rights here derogated are First Amendment rights, judicial review is particularly appropriate. Cf. *Ng Fung Ho* v. *White*, 259 U. S. 276; *Stark* v. *Wickard*, 321 U. S. 288, 312; Davis, "Nonreviewable Administrative Action," 96 *U. of Pa. L. R.* 749, 786-789, 792.

Indeed, no other conclusion is permissible. For if respondents herein should prevail in their assertion as to lack of jurisdiction, the JAFRC is remediless in the face of action which has concededly awful and devastating consequences upon property and constitutional rights of the JAFRC even if respondents acted in excess or violation of power delegated to them by Congress or Constitution. It cannot sue in libel; no provision is made by the Order for a hearing before the Attorney General or anyone else for corrective purposes; nor does the political arena offer a real prospect of relief for the JAFRC and other listed organizations, especially since the actions of respondents in labelling these organizations as "subversive" have the intended and actual effect of diminishing or destroying any efficacy among the electorate that such organizations might possess. Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n.4. To repeat: "Were this case to be not justiciable," executive action stigmatizing an entire organization "could never be challenged in any court. Our Constitution did not contemplate such a result." *United States* v. *Lovett*, 328 U. S. 303, 314.

Nor does the danger inherent in a finding that the question of the constitutionality of action under the Executive Order is non-justiciable end with the JAFRC and the other proscribed organizations. Part III, Section 3 and Part V, Section 2(f) of the Order may now allow, or could be amended to permit, the Attorney General to list religions or races as well as organizations. Of course Article VI, clause 3, as well as the Due Process Clause of the Fifth Amendment of the United States Constitution might thereby be infracted even more clearly than constitutional prohibitions are violated by the Order as it now stands. But justiciability and reviewability are not predicated upon the degree of unconstitutionality. If this Court is unable to consider the constitutionality of the present Order, it would be unable to consider the constitutionality of the hypothesized order. It is respectfully submitted that respondents may not thus escape judicial inquiry into the authority which they have asserted.

C. The Complaint States a Cause of Action for Which Relief Is Available

The Court below held that the circumstance that the designation of the JAFRC "was disclosed to the public press presents no legal ground for relief" since "in the absence of a statute imposing secrecy, it cannot be supposed that the Courts have any power to regulate or control publication of matters concerning the government's business" (R. 39).

That there must be some limits to the use of the prestige and power of high public office to stigmatize individuals and organizations is plain. The Constitution places safeguards about stigmatizing official judgments (see p. 20, *supra*), and only with respect to "Speech or Debate in either House" is it provided that "Senators and Representatives . . . shall not be questioned in any other place"

(Article I, Sec. 6, Cl. 1). Of course, good reasons may be advanced for exempting public officials from liability in damages for matter spoken or written in connection with the performance of their duties; ". . . it would be unfortunate if all government officers were deterred from acting in doubtful cases by fear of later personal liability. . . ." Gellhorn & Schenck, "Tort Actions Against the Federal Government", 47 *Columbia Law Rev.* 722, 724. But the foregoing exemption is not to be extended beyond actions for money damages. *Spaulding* v. *Vilas*, 161 U. S. 483; *Mellon* v. *Brewer*, 57 App. D. C. 126, 18 F. 2d 168, cert. den., 275 U. S. 530; *Jones* v. *Kennedy*, 73 App. D. C. 292, 121 F. 2d 40, cert. den., 314 U. S. 665; but see Gellhorn & Schenck, *op. cit. supra*, at 738.

GRONER, *C. J.*, has said of this exemption that "its cloak of absolute immunity offers such far reaching opportunity for oppression, that it manifestly ought not to be extended beyond the impulse that gave it being" (*Glass* v. *Ickes*, 117 F. 2d 273, 281, cert. den., 311 U. S. 718). Thus the inability to sue an officer in damages for matter written or spoken by him in connection with his duties does not preclude an action in equity where the matter written or spoken is widely disseminated and is utilized, as any other instrument of pressure available to government, to influence the activities of some individual or organization. For just as the inability to recover in damages from an official acting under an unconstitutional law would, obviously, be no basis for denying injunctive relief against the enforcement of that law by that same officer,* so the inability of the JAFRC to recover damages from respondents is no basis for denying the relief here sought. Indeed, the absence of an adequate remedy at law is the necessary condition for this action in equity.

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* In *Jones* v. *Kennedy*, *supra*, acts and proceedings which had been previously held to be unconstitutional (298 U. S. 1) were deemed to be inadequate to found an action in libel.

The absence of a remedy at law for damages; the non-penalizing effect of a suit in equity upon the free exercise of official discretion; and the need for enforcing limits to and the responsibility for governmental pressures and compulsions which may be exerted through the medium of publicity* all indicate that a cause of action in equity has here been stated.

In contrast with the ruling below, and in accord with petitioner's contention is the decision of this Court in *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56, where the Commission indicated that cost and price reports filed by the Utah Fuel Company would be made public at a hearing of the Commission. The Commission's determination had been held non-reviewable as an order (306 U. S., 58), but in the injunction proceedings thereafter instituted against the Commission to restrain the disclosure of the cost and price information this Court finally held that equitable relief against the action of the Commission was available.

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity" (306 U. S., 60).

Similarly, in *Bank of America National Trust & Savings Association* v. *Douglas*, 70 App. D. C. 221, 105 F. 2d 100, an injunction was granted restraining the Securities & Exchange Commission from publicizing certain information obtained by it from the Secretary of the Treasury. In writing for his Court, GRONER, *C. J.*, stated:

> "We think the court had jurisdiction. The Bank alleged that disclosure of the information would result in irreparable injury. Since other remedy was entirely lacking, the cause was a proper one for equitable relief" (105 F. 2d, 102).

* See Note, 43 *Columbia Law Rev.* 837, 942-943.

D. Petitioner Has Standing to Raise the Issues Here Presented

The Court of Appeals held that the JAFRC has no standing to complain of the deprivation of First Amendment rights on the grounds that "Those rights are personal to the individual members" (R. 40). The Court below was in error when it thus held that an unincorporated association may not assert the substantive or procedural rights guaranteed by the Due Process Clause of the Fifth Amendment. In *Grosjean* v. *American Press Company*, 297 U. S. 233, 244, this Court held:

> "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. *Paul* v. *Virginia*, 8 Wall. 168. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & L. Turnp., Road Co.* v. *Sandford*, 164 U. S. 578, 592; *Smyth* v. *Ames*, 169 U. S. 466, 522."

Again, in *Bridges* v. *California*, 314 U. S. 252, the Court sustained the rights to freedom of speech and press, under the Due Process Clause of the Fourteenth Amendment, asserted by corporations which were parties to that action. And in *Hannegan* v. *Esquire*, 327 U. S. 146, the Court indicated that a corporation could assert and rely upon the prohibitions contained in the First Amendment against the abridgement of freedom of the press. *Hague* v. *CIO*, 307 U. S. 496, cited and relied upon below, does not establish that the petitioner herein has no standing to assert rights arising under the Due Process Clause of the Fifth Amendment for that case was a determination under the Privileges and Immunities Clause rather than the Due Process Clause of the Fourteenth Amendment.

Moreover, the basic premise that the petitioner is asserting some right of the organization as distinct from the rights of its members, contributors and supporters, is unsound. An unincorporated association has no identity separate and distinct from its membership. The organization rather than each of the members is denominated as party plaintiff for reasons of procedural convenience only and under the authority of Rule 17(b)(1) of the Federal Rules of Civil Procedure. The status of the organization for procedural purposes does not alter the substantive law that an unincorporated association is the aggregate of its membership; the association has no rights beyond or different from those of its constituents. McKinney's Con. Laws of N. Y. Ann., General Association Law, § 12. The corollary is that the association has the same rights that its members possess. For this reason, this organization could sue in libel in its organizational name. *Kirkman, etc.* v. *Westchester Newspapers, Inc.*, 287 N. Y. 373; *Lubliner* v. *Reinlib*, 50 N. Y. Supp. 2d 786. Consequently, the rights here asserted are the rights of the various individual members and participants in the activities of the JAFRC. Since those members and participants could join in an action to eliminate restrictions upon their activities in violation of the Due Process Clause of the Fifth Amendment, it follows that the organization which may sue on their behalf may assert the same rights. *Alston* v. *School Board of Norfolk*, 112 F. 2d 992, 997.

II

Executive Order 9835 violates the Fifth, Ninth and Tenth Amendments to the United States Constitution in that it unjustifiably abridges freedom of thought, expression and association guaranteed under the First Amendment to the United States Constitution.

For the convenience of the Court and the petitioner this brief will not repeat in substance or language the arguments set out at pages 14 through 51 of the brief submitted by petitioner in support of the petition for writ of certiorari (hereinafter sometimes referred to as "Pet. Br."). Instead, petitioner herein incorporates the aforesaid pages by reference as part of this brief and respectfully requests the Court to refer to said pages 14 through 51 as the statement of the argument and legal principles upon which petitioner relies. The discussion under this heading is confined to considerations arising out of *American Communications Association* v. *Douds*, 339 U. S. 382, which was decided after the petition for certiorari was submitted.

The central feature of Executive Order 9835 is that it authorizes executive officers to inquire into, pass judgment, and impose disabilities upon individuals and organizations on the basis of thoughts, beliefs and opinions. It could not be otherwise for "Loyalty is a matter of the heart and mind. . . ." *Ex Parte Endo*, 323 U. S. 283, 302. The ultimate and principal inquiry under the Order is not whether a man or an organization has done anything,* not

* The respondent Richardson, Chairman of the Loyalty Review Board, has declared that in three years of administration of Executive Order 9835 "there has not been one single instance where espionage has been charged." *NY Herald-Tribune*, March 27, 1950, p. 4, col. 5. Indeed, one "spokesman" for the Loyalty Review Board has been quoted as explaining that the loyalty program is not directly concerned with "security"; "our job is purely and simply to determine whether an employee is loyal to our form of government". *NY Herald-Tribune*, Nov. 28, 1949, p. 26, col. 1.

even whether there has been expressed or advocated any particular doctrine;* it is whether there are "reasonable grounds to believe" that one is "disloyal". When Executive Order 9835 was promulgated there was then in existence a statute which would permit the removal of any federal employee belonging to an organization advocating the overthrow of our constitutional form of government.** And yet the President's Temporary Commission on Employee Loyalty, which drafted Executive Order 9835, stated at page 30 in its Report of November 25, 1946:

> "It is the conviction of the Commission that the narrow limitations of the present statutory standards generally used for determining disloyalty, render it prudent to provide additional and more flexible criteria."

Representative Case of New Jersey, commenting on the Rees Bill, which was the Congressional counterpart of Executive Order 9835, pointed out the essential characteristic of a loyalty program:

> "Until now, however, except in the case of a few so-called sensitive agencies, we have not attempted to discharge a man for an opinion. We have come to the point where we must do that." 93 CR 9149; see also *NY Times*, August 19, 1949, p. 7, col. 3; Nikoloric, "The Government's Loyalty Program", *The American Scholar*, Summer Issue 1950, 285-300.

Accordingly, Part V of the Executive Order, in defining loyalty "standards", specifies that the basic standard is the existence of "reasonable grounds . . . for belief that the person involved is disloyal to the Government of the United States" and the "activities and associations" listed in

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* It was observed by a Congressional committee prior to the promulgation of Executive Order 9835 that a loyalty program was necessary because "very few individuals" openly advocate force or "belong to organizations that so advocate". House Committee on Civil Service, Report of Investigation with Respect to Employee Loyalty and Employment Policies and Practices in the Government of the United States, 79th Cong., 2d Sess. (1946) 3.

** Hatch Act, Section 9A, 5 U. S. C. A. § 118j.

Section 2 of Part V are merely factors "which may be considered in connection with the determination of "disloyalty"; overt behavior and actions, including advocacy, are therefore explicitly made by the Order only evidentiary* and the principal inquiry is into the mental beliefs and attitudes of the probed individual or organization.

This case therefore presents that issue upon which the Court was evenly divided in *American Communications Association* v. *Douds, i.e.,* whether the political thoughts and beliefs of an individual or organization, rather than any overt action or behavior, may be made the principal and ultimate subject of official inquiry and the basis for judgment.**

The fatal defect in any system of thought-probing was early specified by Jefferson when he asked:

> "... whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons."***

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* "Disloyalty" could be found if none of those indicia were present; and "loyalty" found even if all existed, *e.g.,* an agent of the F.B.I. engaging in the proscribed activities and associations for the purpose of gathering information for the F.B.I.

** In the instant case there are difficulties in the way of sustaining the validity of the thought-probing performed under the Executive Order which were not present in *American Communications Association* v. *Douds,* for in that case the question whether a man believed in the overthrow of our form of government by unconstitutional means was to be determined in a perjury prosecution and therefore by means of the regular judicial process with all of its rights and safeguards; under the Executive Order no such protection exists for the individual or organization under scrutiny.

*** Notes on the State of Virginia, 1781-1785, reprinted at *The Complete Jefferson* (Padover ed. 1943) 675; see also his statement in the Bill for Establishing Religious Freedom reprinted at Jones, *Primer of Intellectual Freedom* 145: "that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or suffer from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

It is respectfully submitted that, insofar as the validity of Executive Order 9835 is concerned, it is not a sufficient answer to say that

> "courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *American Communications Association* v. *Doud, supra,* at 411.

The fact that judges, juries and sometimes officials weigh and pass upon the state of men's minds in some circumstances does not mitigate the evils inherent in probing and passing upon political, religious or philosophical thought and opinions. The judge, jury and official who may be trusted to scrutinize and adjudge with impartiality and fairness whether a theft or a shooting was intended or premediated may not with equal sanguinity be relied upon to probe and adjudge political, religious or philosophical attitudes without passion or prejudice.* We have been warned with remarkable prescience that

> "men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees." *Schaefer* v. *United States,* 251 U. S. 466, 495 (BRANDEIS, *J.*, dissenting).

Those judges, juries and officials whose dispassionate good sense prevails in inquiries into non-political thoughts and attitudes fail where the issue is, whether ideas are harbored which threaten the security and integrity of the state. The Star Chamber excesses were not supported exclusively by the Tudors; eminent jurists and public opinion joined in condoning the practices. 5 Holdsworth, *History of Eng-*

* The complex psychological problem in ascertaining a man's loyalty and allegiance, and the scientific approach required therefore have been suggested in Donovan & Jones, "Program for a Democratic Counter Attack to Communist Penetration of Government Service", 58 *Yale Law J.* 1211, 1236-1241.

lish Law (3 ed. 1923) 165, 196. Nor was it some evil tyrant who found that devils and witches were inhabiting New England; capable and somber judges attended by hard-headed New England juries did so. Starkey, *Devil in Massachusetts.* "Heresy trials are foreign to our Constitution" (*United States* v. *Ballard,* 322 U. S. 78, 86) not because "heresy" or "disloyalty" or "dangerous thoughts" are desirable, but because experience past and present demonstrates that such trials are inevitably productive of more mischief than the ideas on trial. Inquiry and condemnation based upon no tangible, manifest action are vulnerable enough to abuse where the issue is non-inflammatory; where judge, jury and official are testing the minds and hearts of men charged with challenging and jeopardizing those institutions upon which we have placed the highest moral premiums and protected by the strongest individual and collective emotions, abuse is inevitable. There is a direct ratio between the facility with which men will believe in the existence of a threat to an institution and the passion and devotion with which those men are attached to the allegedly threatened institution. The higher men consider the stakes, the less the risk men will tolerate. And it is therefore essential that acts, not thoughts, be made the criteria where one is charged as a menace to the national security. For if such a charge is not required to stand or fall upon the existence of demonstrable, tangible, factual proof of criminal action which is the subject of proof, disproof, and capable of scrutiny by all, it may be expected that "guilty" thoughts and opinions, proof of which need not be substantiated by objective facts, will be readily found where the Nation is said to be in danger.

The foreseeable consequences of thought-probing and judgment do not end with the prospect of abuse. Thought-probing violates the notion that the dignity of every individual requires that minimum of privacy which would

allow a man to think and believe without inquiry thereon. Men who may be tried and found wanting for thoughts alone can know no security. Acts they can control; they can usually predict the criminality of such acts; and proof or disproof of action is feasible. But if men can be judged for what others may think they think and believe, not for what they have done, anyone at anytime is subject to the real possibility of being found "guilty" of "disloyalty." For it "is difficult and almost impossible to meet the charge that one's general ethos is treasonable" (*Masses Pub. Co.* v. *Patten*, 244 F. 535, 543 (L. HAND, *J.*) rev'd., 246 F. 24). And, of course, men who must recite and answer for what they think are not free to think; nor are they free to read, to speak, to listen or to assemble since such activity, where thought-probing and thought-judging are allowed, may be self-incriminating. The price of thought-probing and judgment is too high; the Constitution never intended it to be paid.

Nowhere in our Constitution is it made more abundantly clear that it was intended to do away with inquiry into opinions and beliefs on matters political than in the treason clause* (*U. S. Con.*, Art. III, Sec. 3). The prototype of that clause was drafted by Jefferson** who had declared:

> "But our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit."***

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* Disloyalty within the meaning of Executive Order 9835 is very closely akin to a charge of treason. Note that among the activities set forth as standards there are included: sabotage, espionage, treason, unauthorized disclosure of confidential matters under circumstances which indicate disloyalty, and performing public duties so as to serve the interests of another government in preference to the United States. In the Congressional debates on the Rees Bill, disloyalty and treason were closely identified. 93 CR 9120, 9132, 9142, 9149.

** See Hurst, "Treason in the United States," 58 *Harvard Law Rev.* 226, 395, 806 at 251-254.

*** Notes on the State of Virginia, 1781-1785, reprinted at *The Complete Jefferson* (Padover ed. 1943) 675.

It is not surprising therefore that the treason clause makes specified action only, and not "disloyal" thoughts or opinions criminal. Impressive scholarship on the history leading up to and surrounding the drafting and adoption of the treason clause in the United States Constitution yields the conclusion that

> "The record does suggest that the clause was intended to guarantee non-violent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question." Hurst, *op. cit. supra*, at 428-429; see also *id.*, 412, 421, 431; Chafee, *Freedom of Speech in the United States* (2d ed. 1941) 170-173.

When the drafters of the treason clause omitted any reference or analogue to the crime of "compass[ing] or imagin[ing] the death of our lord the King," which was to be found in the Statute of 25 Ed. III, ch. 2 (1350), the predecessor of the English and colonial treason statutes, they indicated their intent that no penal consequences or civil disabilities should follow from "constructive treason", *i.e.*, crimes consisting primarily of evil thoughts and beliefs. See Ploscowe, "Treason", 15 *Encyc. Soc. Sci.* (1944 ed.) 93, 95.

> "The concern uppermost in the framers' minds, [was] that mere mental attitudes or expressions should not be treason. . . ." *United States* v. *Cramer*, 325 U. S. 1, 28.

> ". . . the concept [was] that thoughts and attitudes alone cannot make a treason." *id.*, at 29.

> ". . . the requirement of an overt act is designed to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought or speech." *id.*, at 61 (DOUGLAS, *J.*, dissenting).

Similarly, after the Civil War, disability to hold office was imposed only upon those who, after having taken an oath to support the Constitution, "shall have engaged in insurrection or rebellion . . ., or given aid or comfort to the enemies" (*U. S. Con.*, Amendment XIV, Sec. 3). And for reasons identical to those which motivated the constitutional formulation of the treason clause, this Court has again and again stated its view that under the First Amendment mere opinions and beliefs were above and beyond any official action. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *United States* v. *Ballard*, 322 U. S. 78, 86; *Mutual Film Corp.* v. *Industrial Comm.*, 236 U. S. 230, 243; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642; *Jones* v. *Opelika*, 316 U. S. 584, 593 (REED, *J.*); see also Mill, *On Liberty* (1864 ed.) 23, 27, 28; *cf. Thomas* v. *Collins*, 323 U. S. 516, 531.

It was suggested for the first time, however, in *American Communications Association* v. *Douds*, *supra*, at 408, that in some circumstances official inquiry may be made into and action predicated upon beliefs and opinions. Petitioner does not concede this proposition and relies upon the language in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 625, 642, where this Court stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *If there are any circumstances which permit an exception, they do not now occur to us.*" (Italics supplied).

But even if circumstances may exist which would authorize thought-probing, there is no basis for assuming such circumstances here to exist. Executive Order 9835 was not and is not based upon a real or substantial threat to

our national security.* Prior to and at the time of its promulgation neither our federal civil service nor our national security had suffered any injuries or deterioration which could be said to show any evidence of "disloyal" elements in our civil service (see Pet. Br., pp. 36-43); and the experience under the Order confirms that there was never any threat to that service or security (see Pet. Br. 43-45; see also *N. Y. Herald-Tribune,* May 5, 1950, p. 1, col. 8). Whatever special problems may obtain in so-called sensitive agencies or in positions involving security considerations** can hardly justify the Order which extends to all federal employees. If the Order be considered as a preventative measure based upon possible future action without regard to the past history of the loyalty of the American civil service, then it must be remembered that there are at present sufficient statutory safeguards for our national security which legislation carries with it punishment adequate to deter and prevent any citizen, including federal employees, from espionage, sabotage, etc. (See Pet. Br. 46; see also President Truman's Message of August 8, 1950, 96 CR. 12218). Thus the Executive Board finds only very slight, if any, justification in terms of our national security. And if it is contemplated to justify the Order on the basis of "national unity" then it is appropriate to recall that in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 640-641, a similar appeal to "na-

* For studies of the experience leading up to Executive Order 9835 see Subcommittee of House Civil Service Committee, Report of Investigation with Respect to Employee Loyalty (1946); Report of President's Temporary Commission on Employee Loyalty (1947); Emerson & Helfeld, *op. cit. supra,* 8-26; Abbott, "The Federal Loyalty Program: Background and Problems", 62 *Amer. Pol. Sci. Rev.* 486; Notes, 60 *Harvard Law Rev.* 779; 47 *Columbia Law Rev.* 1161; 96 *U. of Pa. Law Rev.* 381.

** In the State Department, Department of Defense, Army Department, Navy Department, Air Force, Treasury Department (Coast Guard), Commerce Department, Justice Department, Atomic Energy Commission, National Security Resources Board, and National Advisory Committee for Aeronautics, the agency head has the "absolute discretion" to suspend and dismiss any employee "whenever he shall determine such termination necessary or advisable in the interest of the national security." Public Law 733, 81st Cong., 2d Sess., c. 803 (1950).

tional unity" was rejected and this Court stated that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." See also, Commager, "Who is Loyal to America," reprinted at Jones, *Primer of Intellectual Freedom* 25-33. National security and unity are, in any event, best served not by wholesale and indiscriminate thought-probing but by freedom.

> "Freedom itself contributes to security . . . The maintenance of individual freedoms creates the greatest bulwark of our security—the energy and intelligence of free men working together to build and to save their own and their country's freedom. "Even more important, freedom and the dignity of the individual are the very foundation of our society, and the ends for which we are striving. Without them security loses its purpose." Committee for Economic Development, *National Security and Our Individual Freedom* 5.

It is traditional in criticizing governmental action which infringes upon First Amendment rights for brief writers, opinion writers and authors of articles to marshal a parade of horribles wherein the possible evil extensions of the governmental action under review are supplied by imagination. Just such speculation as to the possible extensions of the practice of thought-probing would have been necessary when the Executive Order was first promulgated in 1947. But time has supplied that which imagination would have had to produce in the past. For on September 23, 1950 the Congress authorized the Attorney General of the United States "to detain" those persons whom he has "reasonable ground to believe may" be spies or saboteurs (HR. 9490, 81st Cong., 2d Sess.*). The government which may examine into the mind and heart of a man

* See McConnell, "The Senate at Work on Subversion", *NY Herald-Tribune*, September 16, 1950. p. 8, col. 6-8, for the extraordinary circumstances surrounding the passage of this bill.

to determine whether he is "disloyal" and thereby determine whether he will in the future engage in activity inimical to the welfare of his government, by the same logic will seek and has sought to place in concentration camps men who "may be" spies or saboteurs. If the power to divine a man's thoughts, opinions and future proclivities be assumed, then it may be expected that concentration camps and prisons will be inhabited by men who have done and who have said nothing illegal, but who have been thought to entertain "dangerous" thoughts. It is timely again to ask "whom will you make your inquisitors?" for the answer is that under the Constitution there may be none. This Court should declare the Executive Order unconstitutional and thereby lay at rest the supposition that in this country men may be made to answer for their beliefs and punished for their opinions. We should "have done with this business of . . . examining other people's faiths" (*United States* v. *Ballard*, 322 U. S. 78, 95 (JACKSON, *J.*, dissenting)).

III

Executive Order 9835 violates the Fifth Amendment in that organizations are designated thereunder without due process of law.

It is the basic contention of the petitioner that the power resides nowhere, and particularly not in the Attorney General, to declare an organization as "subversive" under the vague and undefinable standards contained in Executive Order 9835. But if that power be deemed to exist, and, further, if that power be deemed to reside in the Attorney General, then it is urged that the absence of essential safeguards surrounding the exercise of that power violates the Due Process Clause of the Fifth Amendment.

Executive Order 9835 authorizes the Attorney General to designate organizations ". . . as totalitarian, fascist, communist or subversive . . ." (Part III, Section 3). It is not required that the organization be thus designated on the basis of any specified acts nor are any other limitations imposed upon the Attorney General's discretion. The Attorney General's designation is to be premised upon his evaluation of whether the ideas or opinions, about which the organization is formed, are "totalitarian, fascist, communist or subversive". The exercise of this power is delimited by no ascertainable standards, need not be preceded by any hearing or findings, and is non-reviewable by individual or organization.

If petitioner was entitled as a matter of constitutional right to a hearing before the respondents could place petitioner's name on an official blacklist, then, plainly, the Due Process Clause of the Fifth Amendment has been transgressed by respondents. For "when the Constitution requires a fair hearing, it requires a fair one . . ." (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50), and the minimum requirements of a fair hearing have recently been succinctly defined.

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U. S. 257, 273.

Petitioner urges that it was entitled to and denied these minimum guarantees.

Whether the Constitution provides a right to notice and hearing is usually a question decided by history; notice and hearing is required in those cases where in the past

notice and hearing was afforded. *Ownbey* v. *Morgan*, 256 U. S. 94; *Den ex Dem Murray, et al.* v. *Hoboken Land Improvement Co.*, 18 How. (U. S.) 272; Gellhorn, *Administrative Law—Cases and Comments* (2 ed. 1947) 233-234. But history is not the exclusive determinant of whether the Constitution supplies a right to a hearing, otherwise the right would be anachronistic and dissipated as new techniques of governmental action are developed.* Accordingly, due process of law assures, at the least, that one entitled thereto will be afforded those procedures which accord with "the rudiments of fair play". *Chicago M. & St. P. R. Co.*, 232 U. S. 165, 168; *Ohio Bell Tell Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304-305; *Morgan* v. *United States*, 304 U. S. 1, 15.

Even the most elementary notion of fair play dictates that before a group of Americans may be officially stigmatized as "disloyal" or "subversive" they should be heard in their own defense. Sound administration and effective fact-finding would require no less.** It is instructive that the Constitution assigns to the judiciary and the judicial process exclusively, although not without singular safeguards, the function of adjudging a man to be a traitor whether such determination results in slight, great, or no

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* For analyses of the factors which determine when the right to notice and hearing arise under the Constitution see Gellhorn, *op. cit. supra*, 229-239; Freund, *Administrative Powers Over Persons and Property* 154-155; Dickinson, *Administrative Justice and the Supremacy of Law* 106-108, 190-192; Davis, "The Requirement of Opportunity to be Heard in the Administrative Process", 51 *Yale Law J.* 1093; Hale, "Hearings: The Right to a Trial, with Special Reference to Administrative Powers", 42 *Ill. Law Rev.* 749; Hankins, "The Necessity for Administrative Notice and Hearing", 25 *Iowa Law Rev.* 457; Black, "Does Due Process of Law Require An Advance Notice and Hearing", 2 *U. of Chic. Law Rev.* 270, 271-274; Sherwood, "Administrative Procedure and Civil Liberties", 33 *Cornell Law Q.* 235, 242-243; Notes, 80 *U. of Pa. Law Rev.* 96; 34 *Columbia Law Rev.* 332.

** "Hearings thwart ignorance and arbitrary administrative action. They admit the light of public scrutiny to executive chambers. A hearing may disclose unknown facts or presently known facts in a new aspect and tends to deter corruption." Hale, *op. cit. supra*, 750-751; see also 1 Cooley, *Constitutional Limitations* (8 ed. 1927) 647; 80 *U. of Pa. Law Rev.* 96, 97.

punishment or sanctions.* Neither punishment nor sanctions is an essential prerequisite to the type of process contemplated under the Constitution before a man can be adjudged a traitor. Hurst, *op. cit. supra,* at 428 n. 150. It was intended that a man be officially adjudged and stigmatized a traitor—a label identical in odious connotation to that of "disloyalty"—only if he has had his day in court and this regardless of the extent or nature of the penal consequences attendant upon such a finding. The governing consideration is that "No party ought to be condemned unheard. . .".**

Moreover, the issue whether an organization is "subversive" or "disloyal," if at all possible of fair or intelligent inquiry, is of a type traditionally handled by judicial or quasi-judicial processes. Cf. Government's argument in *United States* v. *Lovett,* 328 U. S. 303 as reported at 90 L. ed. 1252-1253. The issue is one of *facts* in controversy and not of policy.*** It involves not a general determination whether organizations are "subversive" or "disloyal" but a case-by-case determination whether particular organizations come within already prescribed categories.**** And each of those individual determinations are, it may be

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* Although the treason clause is plainly a limitation upon powers of the Congress, it appears in Article III which defines the judicial power, thereby indicating that it was intended that the trial of the charge of treason be by the judicial process. It should be further noted that although the treason clause precisely defines the crime of treason, the quantum of proof required, and the maximum punishment, it does not prescribe the punishments or sanctions to be imposed but instead this is left to the Congress.

** British Committee on Minister's Powers, Report, 79 (Cmd 4060, London, 1932, 1936); see also *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. (U. S.) 518, 581 (Webster's Argument); *Galpin* v. *Page,* 18 Wall. (U. S.) 350, 368.

*** See Davis, *op. cit. supra, passim.*

**** This characteristic of administrative action has been deemed to be determinative of the right to notice and hearing:

> ". . . the necessity of a hearing can best be correlated with the degree of discretion as to specific cases vested in the executive (or judicial) officers. Discretion opens the door to individualization. Individual treatment demands assurance of fair play. And such assurance is given—insofar as it can be—by a hearing." Hale, *op. cit. supra,* 761.

presumed, based primarily upon a past or present state of facts, not facts as they will or may exist.* Moreover, in the determination of whether an organization should be listed by the Attorney General, the question raised concerns the political character of the organization as a single entity and does not present a heterogeneous mass of persons raising separate, individual issues of fact. Cf. *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445.** Indeed, in *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, 182, it was observed with respect to hearings which preceded the fixation of the complainant's status:

> "And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist."

In every respect, then, there is here involved the type of governmental action which calls for the use of the adversary hearing process. As in *Walker* v. *Popenoe*, 80 App. D. C. 129, 131, 132, 149 F. 2d 511, 513, 514, where it was held that the barring of a publication from the mails as obscene without a notice or hearing was a denial of due process:

> "In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas of due process implicit in the Fifth Amendment."
>
> "There are no absolute and enduring standards of what is obscene. . . . The determination of whether

* See Hale, *op. cit. supra*, 758-759; Black, *op. cit. supra*, 271.

** One authority has stated that " . . . action affecting a single citizen almost always must be accompanied by a hearing" and concluded that "a hearing should be held whenever private interests are affected by executive action except when large groups of citizens are involved and little discretion is exercised by the officers". Hale, *op. cit. supra*, 760-761, 778; see also Hankins, *op. cit. supra*, 463-468; Black, *op. cit. supra*, 271.

a publication violates such changing standards is certainly one which should not be undertaken without a hearing."

Nor do any sound reasons occur to foreclose to petitioner the right to a hearing. Inherent executive power as well as delegated executive power is subject to conformance with the Due Process Clause of the Fifth Amendment.* *Ex parte Endo*, 323 U. S. 283, 299; Willoughby, *Constitutional Law of the United States* (1912 ed.) 338. There is no emergency which makes it impossible to expend the time which may be necessary for a fair hearing. Cf. *Lawton* v. *Steele*, 152 U. S. 133; *Hirabayashi* v. *United States*, 320 U. S. 81. And the action of the Attorney General in blacklisting petitioner does not merely deprive the JAFRC of a privilege subject to withdrawal at will, for a man is entitled to his fair name and reputation not as a matter of grace or privilege, but as a matter of right. Cf. *United States* v. *Lovett*, 328 U. S. 403. Nor does the blacklisting of petitioner by the Attorney General otherwise come within a category of government action, such as exclusion of aliens (see, *e.g.*, *United States* v. *Shaughnessy*, 338 U. S. 337), tariffs (see, *e.g.*, *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294), legislation, etc., which traditionally may be taken without notice or hearing.** History does not deny what fair play here commands.

It is anticipated that alleged considerations of administrative convenience and necessity may be urged by respondents as a basis for contending that petitioner was

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* Hurst, *op. cit. supra*, 443, points out that "The treason clauses are clearly limitations upon all the agencies of government, instead of being addressed directly to the legislative branch only."

** Plainly the action of the Attorney General does not fall within that classification of action wherein government employees may in some circumstances be refused employment or be dismissed without notice or hearing for petitioner does not sue in the capacity of a government employee complaining of dismissal or an applicant complaining of denial of employment. It is significant that the Executive Order makes some pretense at granting a hearing to employees (Part II, Section 2), but no comparable gesture is made towards organizations which are on the blacklist.

rightfully "branded as subversive" without notice and hearing. Such considerations are not entirely without weight where they exist. But even then it must be remembered that

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay . . ." *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292, 305 (CARDOZO, *J.*)

Moreover, it is submitted that no such considerations are in fact present with respect to adjudging the "loyalty" of an organization. The State of New York made just such a determination the subject of administrative hearings in its recent Feinberg Law.* And the Congress has found no reasons of administrative exigency or national security to deter the Congress from requiring hearings in recent legislation wherein the political characterists and loyalty of organizations are to be ascertained.** In fact, even the House Committee on Un-American Activities has recognized the infirmities of the procedure employed by respondents. A recent report of a sub-committee thereof stated, in connection with a proposed bill which required the registration of designated organizations:

> "The bill provides for administrative hearings in the Department of Justice in those cases where Communist Party front organizations refused to register voluntarily. During this hearing the organization will be given an opportunity to present witnesses in its own behalf, as well as being provided with other safeguards. Full judicial review of the findings of the Attorney General is provided. The subcommittee believes that this provision constitutes a landmark in that it provides for the establishment of proper legal procedures which will eventually re-

* McKinney's Con. Laws of N. Y. Ann. (1950 Supp.), Education Law § 3022 (2).

** HR 9490, Sec. 14(c)(d) 81st Cong., 2d Sess. (1950).

place the ex parte findings under the present loyalty order." Report of the Subcommittee on Legislation of the Committee on Un-American Activities (1948) 5.

Many years before the promulgation of Executive Order 9835 we were enjoined:

> "Remember, there are very precious values of civilization which ultimately, to a large extent, are procedural in their nature. . . . All tribunals, administrative or judicial, have to inquire and examine before they decide. Historic experience lies behind the right to a day in court, and a full day."*

Nowhere is it more appropriate or necessary that full, fair and open hearings be insisted upon than in those instances where an official sits in judgment on political beliefs and opinions. Historically many of the elements of our tradition of fair and public trials derive as a reaction to the secret, *ex parte*, Star Chamber proceedings for the trial of political dissenters. *In re Oliver*, 333 U. S. 257, 268-271; Radin, "The Right to a Public Trial," 6 *Temple Law Q.* 381.

> "It may be true that a ministerial officer, in a secret and private investigation, may strive to ascertain the truth and to do justice, but unless we blind our eyes to the history of the long struggle in the mother country to secure protection to the liberty of the citizen, we must realize that a public investigation before a judicial tribunal, with the assistance of counsel and the privilege of cross-examination, is the best, if not the only, way to secure that right." *United States* v. *Sing Tuck*, 194 U. S. 161, 179 (BREWER, *J.*, dissenting).

Today, as always, the power to adjudge political orthodoxy by officials—who ever tend to identify themselves with the state and therefore to identify political dissent from their

* Address of Mr. Justice FRANKFURTER, quoted at Duane "Mandatory Hearings in the Rule-Making Process", 221 *Annals* 115, 116.

views with disloyalty to the state—is inherently and necessarily subject to abuse; and so, today as always, such power, if it must exist, urgently requires that it be exercised by means of open and fair hearings, the method which best assures truth* as well as justice to those on trial.

On the facts and on the record herein the JAFRC is a lawful organization acting through lawful means to achieve lawful objectives—yet it has been publicly designated as "subversive" by the Attorney General of the United States. Executive Order 9835 empowers that official, who has the duty to prosecute organizations which seek to overthrow our form of government, to adjudge and stigmatize, without prosecuting, an organization as "subversive." Cf. *Masses Pub. Co.* v. *Patten, supra,* at 542-543. The Executive Order authorizes the Attorney General to use the prestige and power of his office to label an organization as "subversive" even where there is absent evidence which would satisfy a judge and a jury that such organization is illegal. This, then, suggests the reason why no notice and hearing was afforded the JAFRC or any other of the designated organizations. A hearing would demonstrate that no evidence exists for imposing upon the JAFRC the odious stigma with which it has been labelled by the Attorney General.** However sufficient such a reason may appear to an executive officer intent upon minimizing those administrative "difficulties" which are inherent in a democratic system of justice, that reason is a basis for rather than a bar to the conclusion that the action of the respondents herein complained of violates the procedural safeguards of the Due Process Clause of the Fifth Amendment.

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* We were wisely counselled early in our history by Franklin that in proceedings based upon charges of crimes akin to disloyalty "perjury [is] too easily made use of against innocence". Hurst, *op. cit. supra,* 403.

** In a formal press release, the Department of Justice has declared that it "has always instituted prosecution in cases where the facts warrant it. This is particularly true in cases involving subversive activities . . . It is patently absurd and unbelievable that the Department of Justice in cases of this character would fail to institute prosecution, *were the requisite evidence available.*" *NY Times,* September 30, 1948, p. 15, col. 3, 5 (emphasis supplied).

CONCLUSION

It is respectfully submitted that the order and judgment of the Court below be reversed and that the motion to dismiss the complaint be denied and petitioner's motion for a preliminary injunction be granted.

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